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No.

In the Supreme Court of the United States

October Term, 1982

FREDERICK P. MILO,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the State of Ohio
Tenth Judicial District Court of Appeals

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QUESTIONS PRESENTED

I. Whether recurrent prosecutorial argument urging rejection of an insanity defense because it was supported by diagnostic interviews but not presented by the accused himself, under oath and subject to cross-examination at trial, constitutes comment violating the Fifth Amendment right not to testify.

II. Whether use of videotaped psychiatric interviews to present the necessary foundation for expert opinion on sanity alters the Fifth Amendment protections so radically that the prosecution can engage in unfettered adverse comment upon defendant's failure to testify.

III. When a State permits an accused to present the basis of his psychiatric opinion testimony through videotaped diagnostic interviews, and then the Appellate Court treats his presentation as a waiver of Fifth Amendment rights, has a knowing, intelligent and voluntary waiver of those constitutional rights occurred?

IV. Whether an accused is denied his Sixth Amendment rights to counsel and confrontation of witnesses when the prosecutor argues that failure of the defense to call coconspirators is an admission that the coconspirators would substantiate defendant's guilt, and further argues that defendant deceived his own counsel and thus, his insanity plea should not be credited.

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OPINION BELOW

The opinion of the Tenth Judicial District Court of Appeals for Franklin County, Ohio has not been reported (A1). The Supreme Court of Ohio refused to exercise jurisdiction by unpublished order (A24-A25).

JURISDICTIONAL STATEMENT

The Tenth Judicial District Court of Appeals for Franklin County, Ohio affirmed Petitioner's conviction of aggravated murder on September 30, 1982. A timely motion for leave to appeal to the Supreme Court of Ohio was denied without opinion on January 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

AMENDMENT 5

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, ...

The Sixth Amendment to the United States Constitution provides, in relevant part:

AMENDMENT 6

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

AMENDMENT 14

Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code §2903.01: Aggravated Murder is set forth at A25.

Ohio Revised Code §2945.39: Plea of Not Guilty By Reason of Insanity; Procedures; Admissions Not Available in Criminal Case is set forth at A26.

STATEMENT OF THE CASE

Petitioner was indicted and convicted of the aggravated murder of his brother, Dean Milo. The State of Ohio presented witnesses who testified that Petitioner Milo had solicited them to find someone to kill his brother, and had paid to have the killing accomplished.

The State presented evidence that Petitioner had conversations with people from Ohio and Arizona concerning the killing of Dean Milo. Anthony Ridle, the contact in Arizona, testified that he contacted Harry Knott in Arizona. Mr. Knott (who had not been apprehended at the time of trial) allegedly told Mr. Ridle he had obtained someone to kill Dean Milo. Petitioner had no contact with or knowledge of these persons, and his connection to them was established only by circumstantial evidence.

At trial, Petitioner pursued pleas of Not Guilty and Not Guilty By Reason of Insanity. The facts of this case made these pleas consistent. The State's evidence was sufficient to prove Petitioner conspired to kill his brother, but left serious questions as to whether the actual killer participated in the conspiracy set afoot by Petitioner. Thus, whether Petitioner's conduct caused the death of the victim was an important factual issue.

Moreover, the conduct was proven to be a product of insanity. The insanity plea was based upon evidence that a continuing pattern of conduct by the victim toward Defendant and the family created a buildup of inadequacy and degradation within Petitioner, with no outlet. Eventually, the conflict between love for his brother and loyalty to his family which was being destroyed by his brother's actions became insoluble. The Petitioner constructed a solution to avoid mental disintegration: the person acting to persecute Petitioner and wrest the family business from the family could not be Dean Milo, but was a substitute who had to be removed. This solution was the product of severe psychosis, a species of paranoia known as Capgras' syndrome. This delusion made Petitioner incapable of refraining from seeking the elimination of the "substitute" by entering the conspiracy.

A first trial resulted in a hung jury, ten of whom voted to acquit because of insanity. (Defendant's Motion for Judgment of Acquittal; attached juror affidavits.) During deliberation at retrial, the jury requested further instruction upon "the legal criteria of insanity," before returning several days later with a verdict of guilty. Petitioner was sentenced and incarcerated. During a later sentencing of a coconspirator, the trial judge in Petitioner's case stated:

> "There's some question in my mind probably always will be, whether or not Fred Milo was insane.
>
> * * * * *
>
> It was a close point. It was a close point." (A32-A33).

In Ohio, the Defendant must prove by a preponderance of the evidence that he either did not know right from wrong or could not refrain from acting in order to establish the insanity defense. A pretrial motion to present the bases for the defense psychiatrist's opinion by the

videotaped diagnostic interviews was granted, conditioned upon State access to the videotapes prior to trial and a limiting instruction. At trial, the defense psychiatrist used the videotapes to relate history, and referred to them for objective and subjective observations which he used to formulate his opinion. During cross-examination, the prosecutor asked if the accused had been put under oath and subjected to cross-examination, as he would be at a trial to test his truthfulness. The defense immediately objected upon Fifth Amendment grounds, moved for mistrial, and was overruled (R. II pp. 508-511).*

The defense moved orally prior to closing argument to "protect the Fifth Amendment rights of the Defendant in closing argument from any comment. . ." (R. III pp. 856-859). The prosecutor dwelt upon no oath or cross-examination of the Defendant being unfair to him and interfering with truth determination before a judge and jury. He urged conviction because of this failure. A defense motion for mistrial was overruled (R. III pp. 862-865). On rebuttal, the State continued to make adverse and direct comment upon the failure of Defendant to present the insanity defense through testimony rather than through the psychiatrist and the videotape interviews. [A27 excerpts the most flagrant comments.] The Ohio Appellate Court ruled the comments did not infringe Fifth Amendment rights in response to the Defendant's First Assignment of Error:

> PERSISTENT, PERVASIVE, AND UNEQUIVOCAL COMMENT UPON THE DEFENDANT'S FAILURE TO PRESENT HIS DEFENSE BY TESTIFYING BEFORE THE JURY AND COROLLARY

---

*The four volume Transcript of Proceedings at the second trial is cited herein as R., followed by the appropriate volume and page references.

COMMENT UPON THE PURPOSE OF NOT TESTIFYING BEING TO DECEIVE THE JURY AND TO OBSTRUCT THE TRUTH-SEEKING PROCESS, ARE VIOLATIVE OF DEFENDANT'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS.

During closing argument, the prosecutor claimed Petitioner had even fooled his own counsel, and thus his insanity defense was not credible, and made other comments that defense counsel's tactics of cross-examination and failure to call some coconspirator witnesses supported Defendant's guilt (R. IV pp. 55-57; 36, 46). Defense objection was overruled (R. IV p. 57). On appeal, Petitioner assigned these comments as error against Sixth Amendment rights to counsel and to confront witnesses against him, and Fourteenth Amendment fundamental fairness grounds:

ASSIGNMENT OF ERROR NO. II

MISCONDUCT OF THE PROSECUTOR IN OPENING AND CLOSING STATEMENTS DENIED DEFENDANT A FAIR TRIAL, BY APPEALING TO CLASS PREJUDICE, IMPLYING DEFENDANT "BOUGHT" HIS DEFENSE, IMPLICATING DEFENDANT'S RIGHT TO POST BOND UNDER THE EIGHTH AMENDMENT, USING DEFENSE COUNSEL AS A "WITNESS" AGAINST DEFENDANT, AND REPEATEDLY CHARACTERIZING THE DEFENSE AS FABRICATED IN AN ATTEMPT TO AVOID AND OBSTRUCT JUSTICE.

The Appellate court rejected the error.

REASONS FOR GRANTING THE WRIT

I. THE INTERACTION OF FIFTH AMENDMENT SELF-INCRIMINATION GUARANTEES WITH PRESENTATION OF THE INSANITY DEFENSE NEEDS EXPLANATION BY THIS COURT TO ASSURE CONSTITUTIONAL RIGHTS ARE NOT WITHDRAWN FROM DEFENDANTS WHO PRESENT DEFENSES BUT DO NOT TESTIFY; THIS RESULT CONFLICTS WITH OTHER COURTS' RULINGS

This Court has spoken clearly upon the principle that the Fifth Amendment privilege against self-incrimination protects a criminal Defendant from adverse comment concerning his failure to testify. *Griffin v, California,* 380 U.S. 609 (1965). The essence of this principle is that guilt may not be urged nor the defense discounted because the Defendant did not personally present his cause to the jury. *See Chapman v. California,* 386 U.S. 18, 26 (1967) (error where the argument upon failing to testify upon an insanity defense is "designed and calculated to make Petitioner's version of the evidence worthless.").

Particularly when an accused presents a defense upon which he bears the burden of proof, tensions between the constitution and the State's desire to convict arise. The insanity defense is a popular target. The tendency to attack the defense by questioning the failure of the Defendant to testify as to his state of mind can be overwhelming, as it was herein:

> The source of the animosity and humiliation is from the Defendant himself. You never heard testimony of humiliation. . . (R. IV p. 46). You will have to go in there and say did the defendant meet his burden based on Position No. 4 [the insanity defense],

> that came from the person that is on trial. There is no question that insanity defenses aren't popular because you really can't say what is in somebody's mind. . . . You can say this is what was in my mind. (R. IV p. 58).

This Court's grapplings with affirmative defenses and constitutional guarantees have always striven to enunciate principles which are constant; the constitution does not change because a Defendant presents a defense. The Ohio Court herein has ignored the applicability of the *Griffin* no comment rule, because the Petitioner chose to plead Not Guilty by Reason of Insanity. By so doing, it has emphasized the necessity for the highest Court in the land to rule upon the boundaries of prosecutorial comment in insanity defense trials.

The recent stir in the state and federal systems regarding the appropriate limitations upon the insanity defense offers further reason for the Court to issue a writ of certiorari herein. As the courts and legislatures become ever more hostile to the defense, the danger that constitutional values will be slighted increases. This case presents an example of the far-reaching implications of that danger—a man's defense can be discredited by explicit argument that he failed to present it by his own testimony. This cause also provides an excellent vehicle for the Supreme Court to balance the Fifth Amendment and the state's right to assign the burden of proof to the defense.

The type of conduct and argument which occurred in Petitioner's trial is not isolated or unusual. Other courts have been faced with prosecutorial arguments which attacked the presentation of mental incapacity defenses for failure of the accused to testify. *See especially*

Chapman v. California, 386 U.S. 18 (1967) (Appendix of Court).

The results obtained in these cases directly conflict in principle with the result in Petitioner's case. In *Pope v. Harper*, 407 F.2d 1303 (9th Cir. 1969), despite overwhelming factual guilt evidence, it was constitutional error for the state to comment "repeatedly and extensively on [defendant's] failure to take the stand . . . specifically used [defendant's] failure to destroy [his insanity] defense." *Id.* at 1305). *Commonwealth v. Goulet*, 374 Mass. 404, 372 N.E.2d 1288 (1978) [the Fifth Amendment is violated by the court's charge implying that "the testimony of the psychiatric witnesses for the defense was to be devalued because the Defendant did not take the stand to allow the jury to hear at first hand the out-of-court assertions of fact and intention he had made to doctors." 372 N.E.2d at 1293-1294.] The only difference between these cases and Petitioner's case is that the psychiatric opinion in plaintiff's case was presented upon a foundation of completeness and accuracy: videotaped psychiatric diagnostic interviews.

In addition, several other courts have examined the interrelationship of the insanity defense presented through expert witnesses and the Fifth Amendment. These courts, contrary to the Ohio courts in Petitioner's case, determined that the defense does not waive Fifth Amendment rights. *Gibson v. Zahradnick*, 581 F.2d 75 (4th Cir. 1978) ("Exercise of a client's right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of his constitutional privilege against self-incrimination." *Id.* at 80); *United States v. Handy*, 454 F.2d 885 (9th Cir. 1971); *United States v. Baird*, 414 F.2d 700 (2d Cir. 1969).

The comment herein is predicated upon the State's unilateral presumption that the jury will not follow clear and accurate limiting instructions. Sophisticated use of comment tainted the entire deliberations on guilt as well as insanity. If the jury cannot be trusted by the State to follow instructions, the State should not be permitted to argue that they will follow a formulaic Fifth Amendment instruction and not be influenced by argument focussing upon failure to take an oath before the jury in a trial setting.

The renewed importance of protecting accused's rights in insanity defense cases recommends Petitioner's cause to this Court, to insure uniform application of the constant principles of Fifth Amendment analysis when a Defendant does not testify in his own behalf yet bears a burden of proof. The dangerous implications of the lower Court's holding herein are that presentation of a defense may waive the Fifth Amendment, or so severely curtail its applicability as to render it meaningless to protect an accused who presents expert psychiatric testimony, including opinions and their basis in Defendant's statements, on his own behalf. The courts of this land have yet to receive the guidance of this Court as to whether any constitutional rights are waived by the presentation of the defense of insanity.

II. INTRODUCTION OF ACCURATE VIDEOTAPED EVIDENCE ON BEHALF OF A CRIMINAL DEFENDANT SHOULD NOT ALTER THE STATE'S DUTY TO REFRAIN FROM GRIFFIN COMMENTS; SUCH ALTERATION IS A PENALTY CREATING AN IMPERMISSIBLE CHOICE BETWEEN FIFTH AMENDMENT RIGHTS AND SIXTH AMENDMENT RIGHTS TO PRESENT A FULL DEFENSE.

Prior to his trial for aggravated murder for soliciting and paying to have his brother killed, Petitioner entered a plea of Not Guilty by Reason of Insanity. The primary basis for this plea was the Petitioner's state of mind that his brother was acting in a way so hostile to his close-knit immigrant family that he could not be the same person. Psychiatric evaluation continued. Every interview between Petitioner and his psychiatrist was either audio or videotaped, depending upon available facilities. These interviews were spontaneous and unrehearsed. The psychiatrist taped the interviews for diagnostic purposes, permitting him to re-observe Petitioner's words, voice inflections, mannerisms, hesitations and manifold other characteristics critical to evaluating and diagnosing the Petitioner's mental state.

Psychiatric opinion testimony must be founded upon a detailed rendition of the interviews with the accused, including his statements. Notes and recollections may be inaccurate or incomplete by their very nature. The prosecution's psychiatric witnesses herein admitted to difficulty in recollection, and thus some inaccuracy and/or confusion, and one testified taping would eliminate these problems (R. III pp. 820-821). Videotape dispels such inaccuracies to the greatest extent possible, and permits the jury to be the primary factfinder, able to rely upon their evaluation of

the psychiatrists' opinions rather than to face the bewildering necessity of choosing from a myriad of different expert opinions with little guidance (as in the John Hinckley trial).

Several months prior to trial, the Petitioner moved in writing, with supporting brief, that the interviews be replayed for the jury during the doctor's testimony, so that he could refer to them to lay the foundation for his observations and opinion of paranoid delusionary state. The jury would thus receive accurate and non-selective renditions of the psychiatric interviews against which to weigh the credibility of Petitioner's doctor's testimony.

The trial Court admitted the videotapes. The State vigorously objected, but agreed that the psychiatrists would all have to repeat in detail the substance of their interviews. In essence, the State objected simply because Petitioner's evidence was too accurate.

Cf. Nixon v. Sirica, 487 F.2d 700, 718 (D.C. Cir. 1973):

> "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony. There is no "constitutional right to rely on possible flaws in the (witnesses') memory. [or bias or credibility or accuracy or completeness, defendant might add]. * * * (N)o other argument can justify excluding an accurate version of a conversation that the (witness) could testify to from memory." [citing *Lopez v. United States*, 373 U.S. 427, 439 (1963)] [There is] no justification . . . for depriving . . . the jury of the best evidence of the conversation available.

At no time was the defense presentation of the videotapes ever referred to as a potential waiver of Petitioner's Fifth Amendment rights. Instead, admissibility was conditioned upon the right of the prosecution to view the

tapes prior to trial, and the giving of a limiting instruction to the jury. That instruction stated:

> "* * * [T]he Court wants to instruct you on this video tape that you will be viewing now. You will be seeing a video tape interview of the Defendant by Dr. Tanay. Now, it is very important that you not consider what the Defendant says on this tape as his testimony in this trial.
>
> The reason for that is twofold. No. 1, what he said on the tape was not under oath. Secondly, there is no opportunity for the State to cross-examine the Defendant concerning what he did say on those tapes. Now, the reason that the Court is going to allow you to view the tapes is to assist you in evaluating the basis upon which Dr. Tanay is going to render his opinion that the Defendant was insane at the time he committed this crime. * * *" [R. II p. 436.]

With this understanding, the defense presented the videotapes. Once presented, the trial Court permitted (and the appellate court upheld) the prosecutor to cross-examine the psychiatrist thusly:

Prosecutor: Q. You know that the *basis of jurisprudence* in this country as far as making a determination of fact and hopefully *arriving at some form of truth in Court* either *before a jury or before a judge* is based on two things, isn't that right? That means you stand just like you did, *you stand up in Court and you take an oath*, isn't that right?

Psychiatrist: A. I have. I am testifying under oath, sir.

Q. Did you swear that man in on that screen there?

Defense: Objection.

Psychiatrist: He did not testify. I am testifying—

Court: Overruled.

Psychiatrist: —about my opinion.

Prosecutor: Q. Doctor, the other, was Fred Milo *ever* under oath, to your knowledge?

A. I—patients are never under oath.

• • • • •

At Side Bar:

Defense: Let the record show that the prosecutor is asking the psychiatrist whether or not the Defendant was placed under oath before he went—before he examined him. I am saying and my objection is, he is getting within the realm of the Fifth Amendment. No person has to testify against themselves. That's what he is trying to imply through the doctor's questioning, that Fred Milo was not under oath and should be under oath and be a witness against himself. Therefore, any questions that he asks him in reference to that are improper. At this time, I move for a mistrial.

Court: The motion for a mistrial is overruled. I mean, your argument didn't even make any sense.

* * * * *

Defense: . . . . What is the significance of him asking a question about if he was under oath? The only significance is that he is trying to—he is implying that he is not going to take the stand. That is the only thing.

* * * * *

Prosecutor: Q. Doctor, the Defendant was not under oath, was he?

A. No.

Q. Okay. And you know that that's *important* in at least the *American system of jurisprudence* as far as making a *determination of truth* in some type of *trial setting?*

A. Well, will you forgive me; but *in this context,* I consider that to be a ridiculous statement. *A doctor does not examine a patient under oath.*

Defense: Objection, he already—

* * * * *

Court: I am sorry. Answer yes or no.

Prosecutor: Q. Doctor, would you agree that another important component to the *determination of truth* at least *in our system of justice is the right of*

the opposing party to cross-examine him?

Defense: Objection.

Court: Overruled. . . .

Psychiatrist: A. IN THE PSYCHIATRIC EVALUATION?

Prosecutor: Q. I AM NOT ASKING YOU THAT, DOCTOR.

Defense: Then I object to it.
(R. II pp. 508-513) (emphasis added).

The State's closing argument also emphasized the presentation of Petitioner's statements should have been through his own testimony before the judge and jury at trial. Because the defense presented the "best evidence" in support of his statutory defense,* the Ohio Courts penalized the Petitioner by permitting State comment upon his failure to personally testify.

The defense use of videotapes enhanced the search for truth. The State was given an advantage by being able to have its psychiatrists view these interviews and render their own opinions as to Petitioner's sanity as well as their opinions as to the correctness of the defense psychiatrist's observations and conclusions therefrom. The defense simply got sketchy notes with which to challenge the prosecution witnesses' opinions.

***Cf. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Calloway v. Wainwright*, 409 F.2d 59 (5th Cir. 1969) (State law permitted Defendant to testify to involuntariness of confession; State cannot comment on Defendant's failure to answer incriminating questions on the merits without violating *Griffin* rule).**

The State could have advanced an argument that the interviews did not support the defense witness's diagnosis. Such argument would be legitimate and all that was necessary to urge the jury to reject the insanity defense. Instead, with manifest purpose, the prosecutor attacked the Petitioner's credibility because the jury couldn't hear and see him at trial being cross-examined. No jury listening to the above-related "cross-examination" would fail to perceive comment that the Defendant did not testify. But no need to speculate exists. The prosecutor argued:

> "You know, not too many things upset me during a prosecution because I guess everything has happened to me in the past. But that [videotape] does because the two basic rights of the system are being denied one party that being the State of Ohio." (R. IV p. 36).

The State can never cross-examine the statements rendered by psychiatric witnesses. State argument that it attacked only the psychiatric opinion is a transparent sham on this record.

This Court in *Chandler v. Florida*, 101 S. Ct. 802 (1981), approved state use of technological improvements in the Court and trial process, so long as the accused is not deprived of a fair trial. The need for progress and experimentation in ways which do not fundamentally and inherently distort the truth-seeking process is a recognized social benefit. The use of videotapes in evidence, as depositions, demonstrative evidence, explanatory background, even presentation of Defendants' confessions and performances during sobriety tests is exploding now, and practiced in many states. Articles on video in the courtroom abound. Psychiatrists have adopted videotapes as critical diagnostic tools in forensic and non-forensic cases.

E.g., Ziskin, *Coping with Psychiatric and Psychological Testimony*, 1977 Supp. pp. 80-88; McGill and Thrasher, *Videotapes: The Reel Thing of the Future*, 11 Trial (#5) 43, 48 (1975).

Videotapes are destined to become more important in criminal trials. This Court should assure that their use is not a cover for depriving accused persons of valuable rights. It is interesting to note the many court decisions approving use of videotapes in evidence *against* a Defendant. *E.g., Hendricks v. Swenson*, 456 F.2d 503 (8th Cir. 1972) (videotaped confession is more accurate, can protect the Defendant); *City of Piqua v. Hinger*, 15 Ohio St. 2d 110, 238 N.E.2d 766 (1978) (videotape of sobriety tests on drivers accused of driving while intoxicated); *State v. Wampler*, 30 Or. App. 931, 569 P.2d 46 (1977) (State may introduce videotaped psychiatric examinations.) The Abscam prosecutions are vivid examples of proving criminal activity by video surveillance. No valid distinction can be drawn between such use of videotapes and use on behalf of the Defendant.

It is important for this Court to judge the procedures by which state courts limit the criminal Defendant from presenting an accurate and technologically advanced case, while giving leeway to the State to use all the new tools to obtain convictions. It is also crucial that this Court reassert the supremacy of federal constitutional guarantees even in trial processes which present significant modern advancements. The Constitution must keep pace with technology.

III. AUTHORIZED USE OF VIDEOTAPED INTERVIEWS CANNOT FORM THE BASIS FOR A STATE APPELLATE COURT TO DEEM AN ACCUSED WAIVED HIS GRIFFIN RIGHTS; SUCH EX POST FACTO WAIVER IS NEITHER KNOWING, INTELLIGENT, OR VOLUNTARY.

In rejecting Petitioner's argument that Respondent had violated his Fifth Amendment rights by the prosecutorial comments detailed above, the Ohio Court of Appeals called the comment "invited error." In essence, the appellate court ruled after the fact that in order for Petitioner to exercise his Sixth Amendment right to present a defense he was required to lose his Fifth Amendment right to remain silent. This finding violates the recognized principle that the exercise of one constitutional right may not be conditioned upon waiver of another.

Furthermore, it is elementary that waivers of constitutional rights must be knowing, intelligent, and voluntary. *E.g., Johnson v. Zerbst*, 304 U.S. 458 (1938). Petitioner was never informed that the price of presenting the best, most accurate evidence would be the loss of the critical right not to incriminate himself and to be free from prosecutorial argument that he was guilty because he hadn't testified. Therefore, he was never in a position to make an intelligent choice to abandon constitutional protections.

No appellate court should be able to waive constitutional guarantees when a Defendant had no warning of such a crucial loss when presenting his defense. The context of the insanity defense and videotaped interviews will raise recurring problems of waiver doctrine. This Court should articulate the standards for any such waiver.

IV. PROSECUTORIAL ARGUMENT IMPLYING DEFENSE COUNSEL'S BELIEF IN HIS OWN CLIENT'S GUILT AND STATING DEFENSE COUNSEL WAS HIMSELF DECEIVED BY HIS CLIENT'S DEFENSE IS AN INSIDIOUS AFFRONT TO PRIMARY SIXTH AMENDMENT VALUES NOT YET EXAMINED BY THIS COURT.

In the midst of a closing argument characterized by prejudicial statements which penalized Petitioner for having exercised his Fifth Amendment right not to testify and his statutory right to interpose an insanity defense, the prosecutor also interjected the following statements, which penalize Petitioner for having exercised his Sixth Amendment rights to counsel and confrontation of witnesses.

> [Defense counsel] thinks it [cross-examination] is very important, because aggressively [sic] cross-examined just about all the State's witnesses, anybody that really damaged his client. (R. IV p. 36). Any [conspirator] witness . . . [defense counsel] feels would establish his Defendant's innocence, lack of responsibility, he would have them in here. The reason he didn't have them in here is because they confirm the Defendant's guilty. (R. IV p. 46). Consider the source of the defense. . . We know very importantly that he [petitioner] deceived his attorney. [Defense counsel] is not the easiest person to deceive. . . . But Fred [Milo] was able to do it. . . [He] was able to refrain from confessing to his lawyer. . . . [Information about agreements was] another form of deception to a person [counsel] that is pretty hard to deceive. (R. IV pp. 55-57).

These are deliberate comments, striking at the core of the Sixth Amendment guarantees of counsel to guide the defense in strategic decisions and of confrontation of witnesses. Counsel is turned into an expert witness against his own client because he chose to cross-examine adverse witnesses and not to call convicted coconspirators. Ironically, no matter what counsel did defend—or fail to defend—the State argued that an inference of guilt should be drawn. Further, counsel is used as a "witness" against Petitioner's defense, when the State suggests that he was deceived into presenting the insanity defense. The Sixth Amendment safeguards are a recognition that counsel must guide the defense through a complex prosecution and that the jury must determine guilt or innocence only upon actual evidence presented. Counsel is critical to our assurance that the criminal accused is able to invoke the procedural and substantive safeguards that distinguish our system of justice. *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980).

The type of argument presented against Petitioner is aimed at misleading the jury into believing that presentation of a vigorous defense and defense tactical decisions are indicative of a defendant's guilt. *Mostade v. Engle*, 507 F. Supp. 402 (N.D. 1981), recognizes the dangerous flaw of such arguments.

This Court has not ruled upon the question here presented. The implications of permitting the prosecution to urge a conclusion of guilt based upon defense counsel's conduct of the trial defense are all harmful. No redeeming virtue can be claimed. Sixth Amendment rights must not be penalized in such a manner if the constitutional protections are to remain strong and undiluted, "approach-[ing] immortality as nearly as human institutions can approach it." *Cohens v. Virginia*, 6 Wheat. 264, 387, 5 L. Ed.

257 (1821) (Marshall, *C.J.*), cited in *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioner's case presents an appropriate vehicle for the Court to articulate standards for the protection of this aspect of Sixth Amendment rights.

CONCLUSION

Because his cause presents novel issues concerning recurring problems on issues of national impact such as the insanity defense, videotape evidence, and penalties upon constitutional rights when they interact in these contexts, petitioner prays the Supreme Court of the United States to issue a writ of certiorari to the Tenth District Court of Appeals for Franklin County, Ohio.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR FRANKLIN COUNTY, OHIO

(Rendered September 30, 1982)

No. 81AP-746

IN THE COURT OF APPEALS

FOR FRANKLIN COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

FREDERICK P. MILO,

Defendant-Appellant.

OPINION

NORRIS, *J.*

Defendant appeals from his conviction in the Court of Common Pleas of Franklin County for the aggravated murder of his brother, Constantine D. (Dean) Milo. Defendant had entered pleas of not guilty and not guilty by reason of insanity.

Several codefendants were permitted to plead guilty to the lesser included offense of conspiracy to commit aggravated murder in exchange for their cooperation and testimony against defendant. The state contended that defendant had procured and conspired with others to murder his brother.

Defendant was granted a change of venue to Franklin County as the result of extensive pretrial publicity in the Akron-Summit County area. Following a first trial where the jury was unable to agree upon a verdict, trial was recommenced on July 13, 1981.

At trial, testimony indicated that the Milo Beauty & Barber Supply Company was founded by defendant's father, Sotir Milo, and was operated as a family business. Under the direction of Dean Milo, the business expanded. By 1974, Dean began expressing a desire for more control.

Sotir Milo testified that it was his and Mrs. Milo's intention that their three children, defendant, Dean, and Sophie, share equally in the business but that, as the result of pressure from Dean, in 1976 he signed a document which gave Dean control of the company.

By 1979, Dean Milo had relieved defendant of most of his duties; by June 1979, defendant and Sophie had been removed from the board of directors; and, in August 1979, defendant and Sophie were fired. By January 1980, Sotir Milo had also been removed from the board.

Anthony Ridle, a former employee of the Milo company, testified that, after termination of his employment, he moved to Arizona where he operated a night club near Phoenix called the Star Systems; that, in May or June of 1980, he spoke by telephone with defendant who stated that he wanted Ridle to find a hit man to kill his brother, who was going to be in Phoenix; that he spoke with Harry Knott, a friend who was in business with him operating the night club, and Knott said that he could find someone and he relayed this information to defendant via Ray Sessic, another one of the codefendants; that he traveled to Cleveland to pick up money and a picture of Dean from defendant; that he gave the money to Knott, who,

together with a hit man, trailed Dean while he was in Phoenix but had no opportunity to kill him prior to his returning to Ohio; that hit men then went to Ohio at defendant's request; that Dean went to Florida and the hit men followed; that Sessic called him on approximately August 8 to say that Dean was returning to Akron, which information he relayed to Knott; that, on August 10, Knott called Ridle to say that the job was completed; and that he and defendant subsequently discussed defendant's paying for his brother's murder.

David Hardin testified that an acquaintance, John Harris, told him that he could make some money if he would kill Dean, and he agreed; that, on August 10, at approximately 12:30 or 1:00 a.m., he and Harris drove to Dean's residence; that he knocked on the door while holding a blank Western Union telegram form; that, when Dean answered, he told Dean he had a telegram for him and then told him to lie on the floor and shot him in the back of the head; that he picked up a chair cushion, put it over Dean's head, and shot him again through the cushion; and that he and Harris then flew to Phoenix and met with Knott. Hardin also mentioned occasions prior to the killing on which Harris received Western Union money orders.

When Dean's body was found, a blank telegram form and two shell casings were found on the floor in front of his body. A cushion with powder burns was found on the upper portion of his body, and there were two bullet wounds in his head. The time of death was estimated to have been at approximately 2:00 to 4:00 a.m., on August 10.

Mary Beth Wabol, Ridle's sister, testified that defendant had called Star Systems, on occasion, to talk with Ridle. She also testified that she had observed Knott and Harris exchange money and that, on several occasions Hardin had accompanied Harris to the club.

Police Officer Richard Craven testified that receipts for four money orders were found in a house trailer in which Knott had resided. All were for money orders addressed to John Harris.

Dr. Emmanuel Tanay, a psychiatrist, testified on defendant's behalf that his diagnosis was that defendant suffered from a paranoid disorder, which was a psychotic illness, and that he had imposter's syndrome which caused him to believe that someone else had been put in his brother's place; that defendant had been involved with the idea of having his brother killed since February 1981; and that it was his opinion that defendant was mentally ill and could not refrain from his actions.

On rebuttal, expert witnesses for the state offered their opinions that defendant was sane at the time of the acts and could have refrained from procuring someone to kill his brother.

Defendant raises five assignments of error:

"I. Persistent, pervasive, and unequivocal comment upon the defendant's failure to present his defense by testifying before the jury and corollary comment upon the purpose of not testifying being to deceive the jury and to obstruct the truth-seeking process, are violative of defendant's Fifth and Fourteenth Amendment rights.

"II. Misconduct of the prosecutor in opening and closing statements denied defendant a fair trial, by appealing to class prejudice, implying defendant 'bought' his defense, implicating defendant's right to post bond under the Eighth Amendment, using defense counsel as a 'witness' against defendant, and repeatedly characterizing the defense as fabricated in an attempt to avoid and obstruct justice.

"III. The court's inapplicable jury instruction concerning rage or impulse not constituting insanity misinterpreted the defense theory and erroneously permitted the jury to reach a verdict on incorrect law.

"IV. Crucial evidence was admitted in violation of rule and constitutional confrontation rights: telephone records were never adequately identified to serve the proof purpose of the state and thus required building inference upon inference; telegraphic receipts were never made relevant; alleged coconspirator declarations were not tied up, unreliable, and not in furtherance.

"V. Defendant was entitled to judgment of acquittal of aggravated murder, as the state failed to produce evidence sufficient to convince a rational trier of fact beyond a reasonable doubt that defendant was acting in complicity with Anthony Ridle, Harry Knott, John Harris, David Harden [sic], only uncorroborated testimony of an 'accomplice' implicates defendant as conspiring with these persons."

I

The basis of defendant's first assignment of error is his contention that the state impermissibly commented upon his failure to testify on his own behalf. The origin of the comments complained of may be traced to a ruling by the trial court, over the state's vigorous objection, that permitted defendant to show to the jury a video tape of an interview of defendant conducted by his psychiatrist, Dr. Tanay. In announcing his ruling, the trial court informed counsel that:

"I will have to tell the Jury now that I am going to allow them to view the video taped interview of the

Defendant. I will tell the Jury that they are not to consider this as his testimony in this case because it is * * * not under oath and not subject to cross-examination; and also, that the reason I am allowing them to view the tape is so that they can evaluate for themselves the basis upon which Dr. Tanay rendered his opinion that the Defendant was insane at the time." [Tr. II, 406.]

The court then advised the jury that:

"* * * [T]he Court wants to instruct you on this video tape that you will be viewing now. You will be seeing a video tape interview of the Defendant by Dr. Tanay. Now, it is very important that you not consider what the Defendant says on this tape as his testimony in this trial.

"The reason for that is twofold. No. 1, what he said on the tape was not under oath. Secondly, there is no opportunity for the State to cross-examine the Defendant concerning what he did say on those tapes. Now, the reason that the Court is going to allow you to view the tapes is to assist you in evaluating the basis upon which Dr. Tanay is going to render his opinion that the Defendant was insane at the time he committed this crime. * * *" [Tr. II, 436.]

Defense counsel objected neither to the conditions contained in the trial court's ruling, nor to the court's resulting cautionary instructions to the jury.

Typical of the portions of the prosecutor's examination of Dr. Tanay, objected to by defense counsel, is the following interchange:

"Q. Did you swear that man in on that screen there?

"Mr. Pappas: Objection.

"The Witness: He did not testify. I am testifying—

"The Court: Overruled.

"The Witness: —about my opinion.

"Q. (By Mr. Zuch) Doctor, the other, was Fred Milo ever under oath, to your knowledge?

"A. I—patients are never under oath.

"• • •

"Q. • • • Doctor, the Defendant was not under oath, was he?

"A. No.

"Q. Okay. And you know that that's important in at least the American system of jurisprudence as far as making a determination of truth in some type of trial setting?

"A. Well, will you forgive me; but in this context, I consider that to be a ridiculous statement. A doctor does not examine a patient under oath.

"• • •

"Q. • • • Doctor, would you agree that another important component to the determination of truth at least in our system of justice is the right of the opposing party to cross-examine him?

"• • •

"The Witness: Oh, I think that cross-examination is a much overrated device that only on T.V. it produces a lot of information. I think that if you are asking my opinion, I will tell you. I think that cross-examination as this exercise here shows, it doesn't

produce much information or data. I don't believe that it is a very useful device at all. * * *

"* * *

"Q. Doctor, would you agree with me that the video tape that you showed us at least for a determination of truth really has nothing to do with this case as far as determining the truth?

"A. On the contrary. I think it is of tremendous value. By viewing this tape, a Jury or any other person can arrive at a conclusion: Are these matters consistent? Is this individual, in fact, impressing us as providing sufficient information for this psychiatrist, being me, to arrive at an opinion? I think that's why the Court admitted this tape because it would make it possible, I believe, for the Jury to see what is the basis of my opinion. * * *" [Tr. II, 508-514.]

Defendant also points to repeated instances during the state's closing argument when he asserts that, by referring to his not being under oath and subject to cross-examination, the state was improperly calling to the jury's attention his failure to testify.

Under the circumstances of this case, we do not believe that the conduct of the prosecutor amounted to unequivocal adverse comment on defendant's failure to testify. The language used was not manifestly intended to be, nor was it of such a character that the jury naturally and necessarily would have taken it to be, a comment on defendant's failure to testify. *State v. Cooper* (1977), 52 Ohio St.2d 163, at 173. Nor, upon consideration of the entire record in the context of the prosecutor's comments, do we find that the statements and conduct were inflammatory or prejudicial to the rights of defendant. See *State v. Wade* (1978), 53 Ohio St.2d 182, at 186.

It must be remembered that it was defendant who sought to have the video taped interview presented to the jury. The state protested realizing that it was faced, as a practical matter, with a situation where the jury would hear defendant's story from defendant's own lips without defendant being under oath or subject to cross-examination. While the use of the video tape by the defense might therefore have amounted to a good trial tactic, by choosing that tactic the defendant placed the state in the position where it felt obliged to emphasize the trial judge's cautionary instructions to the jury in an effort to counteract any exculpatory effect defendant's story might leave with the jury, since it was unable to accomplish that end through cross-examination. Under those circumstances, defendant can hardly complain that the state reminded the jury of the trial court's instructions, when it was defendant who placed the state in a position that invited such comments and reminders. Under the doctrine of "invited error", a party will not be heard to complain on appeal of alleged errors which he himself has induced or provoked the trial court or his opponent to commit, since the party was actively responsible for the conduct complained of. *Lester v. Leuck* (1943), 143 Ohio St. 91, first syllabus; *Krause v. Morgan* (1895), 53 Ohio St. 26; *Tewksbury v. Cacciacarro* (Ct. App. 1957), 78 Ohio Law Abs. 193.

Based upon the entirety of the circumstances, we conclude that the prosecutor's questioning and comments amounted to a permissible reference to the cautionary instructions given the jury by the trial court, rather than an effort to focus attention upon the silence of defendant. See *State v. Goods* (Oct. 6, 1981), No. 81AP-390, unreported (1981 Decisions 3072, at 3075).

The first assignment of error is overruled.

II

In his second assignment of error, defendant contends that the state, in opening and closing statements, prejudiced his cause by appealing to class prejudice, utilizing his own counsel as a witness against him, and by characterizing his defense as fabricated in an attempt to avoid and obstruct justice. While he points in his brief to at least fourteen instances of purported error, we note that defense counsel, at trial, interposed objections in only two of those instances.

Generally, an appellate court will not consider any error which counsel for the party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when the error could have been avoided or corrected by the trial court. *State v. Williams* (1977), 51 Ohio St.2d 112; *State v. Gordon* (1971), 28 Ohio St.2d 45. This rule applies to the failure to assert constitutional rights in criminal cases. *State v. Lancaster* (1971), 25 Ohio St.2d 83. However, plain errors or defects affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. Crim. R. 52(B); Evid. R. 103(D). Plain error is obvious error which is prejudicial to an accused, although neither objected to nor affirmatively waived by him, which involves the public interest in the sense that if it were allowed to stand, there would be a substantial adverse impact upon the integrity of, and the public's confidence in, judicial proceedings. The error must be fundamental and have occurred under such exceptional circumstances that the appellate court should act to preserve the public reputation of judicial proceedings for fairness and integrity. *State v. Craft* (1977), 52 Ohio App.2d 1, at 7. The plain error rule should be invoked by an appellate court only in exceptional circumstances to avoid a mis-

carriage of justice. *State v. Wolery* (1976), 46 Ohio St.2d 316, at 327.

After a thorough examination of the instances now complained of on appeal, but which were not the subject of objection before the trial court, we conclude that those instances clearly do not rise to the stature of plain error and need not be recognized by us in order to avoid a miscarriage of justice.

Nor are we able to say that the trial court abused its discretion in overruling the few objections lodged by defense counsel. Counsel objected at trial to the state's reference in opening statement to defendant's financial ability to make bail while the state's witnesses were unable to, on the ground that the statement was argumentative. It is hornbook law that defendant may not on appeal urge a new ground for his objection. *Yuin v. Hilton* (1956), 165 Ohio St. 164. The state argued that comment on defendant's ability to post bond was permissible in response to defense counsel's reference in *voir dire* to the state's witnesses being in jail. In that context, the state's comment may be viewed as a proper retaliatory argument. See *Tewksbury v. Cacciacarro, supra.*

Counsel also objected to comments by the prosecutor in closing argument to the effect that defendant had deceived his father and also his attorney when he initially appeared with his attorney before the police and denied any knowledge of the crime, and then later changed his story. No ground was stated for the objection. We conclude that the statement was within the permissible scope of argument when read within the context of the state's argument that defendant was not a mentally ill person but, rather, a calculating rational one.

The second assignment of error is overruled.

III

Defendant, in his third assignment of error, asserts that the trial court erred in giving the following instruction:

> "The Court charges you that an act committed under stress of emotion, motive, jealousy, impulse, rage or passion, however strong and apparently uncontrollable is not an excuse for an offense by a person not otherwise insane as that term has previously been defined for you in my instructions." [Tr. III, 930-931.]

The assignment of error is without merit. The complaint is not with the form of the instruction,[1] but with the fact that it was given following instructions defining the defense of insanity—instructions about which defendant had no objection.

While it may indeed be true that the instruction complained of is not consistent with defendant's theory of the case, it nevertheless is consistent with evidence in the case. For example, the state's expert witness testified that defendant felt anger and rage toward his brother and that the anger and rage would account for a rational motive to kill Dean, as opposed to an irrational one.

The third assignment of error is overruled.

IV

In his fourth assignment of error, defendant first contends that records of telephone calls were not admissible because the parties to the calls were not identified, and because the purpose for which they were introduced re-

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1. The instruction was an almost verbatim rendition of one found in Ohio Judicial Conference, Ohio Jury Instructions, Chapter 411.53(3).

quired the jury to construct an inference upon an inference.

The custodian of records for the Ohio Bell Telephone Company testified that copies of billings rendered to defendant and to Sessic indicated that a call was made from defendant's telephone number to Sessic's telephone number on August 9, 1980, at 7:08 p.m.; that, at 7:15 p.m. that same day, a call was made from Sessic's number to Tempe, Arizona; and that the next day a call was placed from Sessic's number to defendant's number. Defendant objected to this testimony on the ground that it was irrelevent because the only evidence that Sessic was a coconspirator was the uncorroborated testimony of Ridle; that Sessic alone could testify as to the calls, the parties to the calls, and their contents; and that, because the parties to the calls had not been identified, an inadequate foundation had been laid for the admission of the records. The state countered that the records were being offered only for the purpose of showing that the calls were made from one residence to another, and not to establish the contents of the conversations. In final argument, the state argued that the records permitted the jury to infer that defendant was actively involved in communicating as part of a "chain of command" that resulted in the killing of his brother.

Defendant's argument on "foundational relevancy" is grounded upon his reading of Evid. R. 901:

"(A) General provision.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

"(B) Illustrations.

"By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

"• • •

"(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called • • •." [Evid. R. 901(A) and (B).]

The requirement of the rule is that, in order for the contents of telephone conversations to be admitted into evidence, certain groundwork must be laid to assure that the evidence is what it purports to be—a conversation between the parties who were supposed to be conversing. Defendant's position might have merit had the records been admitted as evidence of the contents of the telephone conversations; however, here, the evidence sought to be introduced was not of the contents of the conversations but, instead, of records that calls were placed between two numbers. The state hoped that this circumstantial evidence would give rise to an inference that the two parties in whose names the telephone numbers were listed conversed on the dates and at the times listed in the records. The evidence was relevant to corroborate the testimony of witnesses who said that telephone conversations took place between those parties, as part of the conspiracy. The authenticity of the records was properly vouched for by their custodian.

Defendant next argues that the trial court erred in admitting receipts for Western Union money orders sent

on July 2, 1980 from "Paul Henderson" in Arizona to "John Harris" in Cleveland; on July 24, 1980 from "Bob Johnson" in Arizona to "John Harris" in Cincinnati; on August 5, 1980 from "Paul Henderson" in Arizona to "John Harris" in Cleveland; and on August 10, 1980 from "Paul Henderson" in Arizona to "John Harris" in Cleveland. All four receipts were discovered in the residence last occupied by Knott prior to his disappearance. Defendant complains that the state failed to show the relevancy and authenticity of the receipts since there was no evidence that Knott was the sender, and no evidence was offered that the John Harris of the money orders was the John Harris of the conspiracy. Defendant's complaints go to the weight to be given the evidence, not to its admissibility. The place and circumstances in which the documents were found argue for their authenticity—that they are what they purported to be: receipts for money orders sent to Harris during the weeks before the killing, and as such are relevant to establish the link between Knott and Harris, and to corrorobate Hardin's testimony concerning the whereabouts of Hardin and Harris and of the receipt of money from Western Union offices.

A more difficult problem is raised by defendant's contention that it was error to permit Hardin to testify as to statements Harris had made to him, which tended to link Harris to a conspiracy involving defendant.

Portions of Evid. R. 801 are important to our inquiry:

"(A) Statement.

"A 'statement' is (1) an oral or written assertion * * *.

"(B) Declarant.

"A 'declarant' is a person who makes a statement.

"(C) Hearsay.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

"(D) Statements which are not hearsay.

"A statement is not hearsay if:

"• • •

"(2) *Admission by party-opponent.* The statement is offered against a party and is • • • (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." [Evid. R. 801.]

The rule recognized by Ohio courts concerning admission of out-of-court declarations of coconspirators, prior to the adoption of the Rules of Evidence, permitted testimony of such declarations but was stated in terms of an exception to the rule against hearsay:

"In a criminal case, where the existence of a conspiracy to rob has been established, an extrajudicial statement of a co-conspirator made in furtherance of the objectives of that conspiracy is admissible in evidence as an exception to the hearsay rule, and is not violative of defendant's constitutional right of confrontation and cross-examination." [*State v. Carver* (1972), 30 Ohio St.2d 280, second syllabus.]

The rationale given by the Supreme Court for the long-standing rule is that declarations of a party's coconspirator should be admissible essentially the same as if made by the party since by the act of conspiring together the conspirators have joined together in a common design

and the declarations of each should be regarded as the declarations of all, each being deemed the agent of all. *Fouts v. State* (1857), 7 Ohio St. 471; *Patton v. State* (1856), 6 Ohio St. 467. That this agency-related theory still has vitality is evidenced by the Supreme Court having grouped the rule in subdivision (D)(2) of Evid. R. 801, together with agency-related concepts.

The plain language of Evid. R. 801(D)(2)(e) indicates that the coconspirator rule applies if five conditions are established:

(1) The existence of a conspiracy;

(2) The defendant's participation in the conspiracy;

(3) The declarant's participation in the conspiracy;

(4) The statement was made during the course of the conspiracy; and

(5) The statement was in furtherance of the conspiracy. See Giannelli, Ohio Evidence Manual (1982), Sec. 801.15.

A conspiracy exists where two or more persons plan or agree to commit a crime, coupled with an overt act substantial enough to show an intention to carry the conspiracy through to completion. See R.C. 2923.01. While the Supreme Court has not construed Evid. R. 801(D)(2)(e) at any length, we find no indication in the rule itself to indicate that the Supreme Court, in adopting the rule, intended to change two important safeguards found in the case law predating the Rules of Evidence:

(1) That, as to the order of proof concerning the existence of a conspiracy, and of the defendant's and declarant's participation in it, the evidence must have been received prior to the proffer of the coconspirator's out-of-court declaration. See *State v. Thomas* (1980), 61 Ohio

St.2d 223, at 232; *State v. Osborne* (1976), 49 Ohio St.2d 135, at 143; *State v. Carver, supra,* second syllabus; *Fouts v. State, supra,* second syllabus.

(2) That the standard of proof to be met in showing the existence of a participation in the conspiracy by independent evidence is that of making out a *prima facie* case. *State v. Thomas, supra,* at 232; *State v. Weind* (1977), 50 Ohio St.2d 224, at 241; *State v. Osborne, supra,* at 143. For argument *contra,* see Giannelli, Ohio Evidence Manual, *supra,* at Sec. 801.15(e).

Defendant argues that the trial court erred in admitting the out-of-court declarations because (1) the state had not yet introduced sufficient proof that connected Harris to Knott, so that the existence of a conspiracy involving Harris, Knott, and defendant had not been established, and (2) the declarations were neither made during the course of the conspiracy, nor in its furtherance. The testimony objected to by defendant was that of Hardin to the effect that Harris told him various things about Dean Milo's whereabouts, that defendant wanted his brother killed, and that defendant had been arrested. In overruling defendant's objections, the trial court held that the only thing required of the state to prove as a condition precedent to the proffered testimony was that a conspiracy involving defendant existed, and that the state was not required to prove also that defendant was involved as a coconspirator with the declarant. As pointed out above, the trial court erred in its understanding of the law. Although there was sufficient evidence at that point to make out a *prima facie* case that a conspiracy existed involving defendant, Ridle, Sessic, and Knott, and another involving Harris and Hardin, there was insufficient proof that the declarant (Harris) was involved in the conspiracy in which defendant was involved.

However, while it was error to admit Hardin's testimony at that point in the proceedings, the error was not prejudicial in view of other abundant testimony which was presented later linking Harris and Hardin to Knott, and thereby to the conspiracy in which defendant was involved. In addition, the declarations themselves—of defendant's desire to have his brother killed—were only cumulative of other evidence on this point. See, e.g., *Harrington v. California* (1969), 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284. Indeed, the declarations are consistent with defendant's theory of the case, as evidenced by these excerpts from his brief:

> "* * * FRED MILO was in a state of raging internal conflict, despite his external submission to both his brother Dean's and his parents' conflicting pressures and demands. The treatment meted out by Dean was not only threatening family unity and the family business, it was uncharacteristic and grossly disrespectful to the head of the family. Determining that Dean could not be acting in such a manner, FRED decided that a substitute was destroying the family.
>
> "* * *
>
> "The Defendant presented the testimony of Dr. Emanuel Tanay, a forensic psychiatrist, who concluded after extensive interviews, review of the tapes of those interviews, research into family and ethnic background, and study of the statements which the alleged co-conspirators gave concerning FREDERICK MILO's conduct, that FREDERICK MILO suffered from a paranoid disorder, and had a paranoid delusion that his brother had been replaced (Capgras' syndrome); such mental illness caused a severe defect in his rational powers, leading him to act to solve the terrible family and business conflict by removing its

source—Dean Milo's replacement. FREDERICK MILO, in the doctor's opinion, was unable to refrain from acting in such a manner." [Appellant's brief, at 4, 6.]

Accordingly, it cannot be argued that the declarations were of such an inflammatory nature as to prejudice defendant's cause in the eyes of the jury. The fourth assignment of error is overruled.

V

Defendant's fifth assignment of error is predicated upon his assertion that there was insufficient evidence to corroborate the testimony of a coconspirator, Ridle, that defendant was involved in the conspiracy which resulted in his brother's murder. This assertion is founded upon case law, and R.C. 2923.03:

"(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

"(1) Solicit or procure another to commit the offense;

"(2) Aid or abet another in committing the offense;

"(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;

"* * *

"(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence." [R.C. 2923.03(A)(1), (2), (3) and (D).]

The "other evidence" referred to in R.C. 2923.03(D) may consist of the testimony of other accomplices or coconspirators. *State v. Vorys* (1978), 56 Ohio St.2d 107. It is not necessary that the crime be proved independently of the testimony of the accomplice, or that the testimony of the accomplice be corroborated in every particular, but only that there be circumstantial evidence, or testimony of some other witness, tending to connect defendant with the crime and to prove some of the material facts testified to by the accomplice. *State v. Robinson* (1910), 83 Ohio St. 136, at 143; *State v. Allsup* (1980), 67 Ohio App.2d 131. See also *State v. Pearson* (1980), 62 Ohio St.2d 291. It is not necessary that the defendant be shown to have known the identity of all his coconspirators or accomplices when it is shown that the defendant knew, or had reasonable cause to believe, that a person with whom he conspired also conspired with another to commit the offense. See R.C. 2923.01(C).

As was the case in his fourth assignment of error, defendant asserts that there was no evidence to link a conspiracy which may have involved himself, Ridle, Sessic, and Knott, with one involving Harris and Hardin.

We disagree with defendant's version of the evidence, as there was sufficient evidence both to corroborate Ridle's testimony and to link defendant with the entire conspiracy that resulted in Dean Milo's death.

For example, Wabol testified that Knott and Harris had been friends prior to the killing; that the telephone bill for Star Systems indicated that a call had been placed to Akron on July 31, 1980, and charges had been reversed for a call from Cleveland to the club on August 1, 1980; and that she saw Hardin at the club in August of 1980. Hardin testified that he heard Harris talking by telephone to "Harry" in Arizona; that prior to the killing he called

Knott in Tempe, Arizona and asked him for money and received money through a Western Union money order; that after the murder he and Harris returned to Arizona, where Hardin met Knott; and that, after their return to Arizona, Harris called Knott and asked for money for Hardin and Hardin then received $700. The receipts found in Knott's former trailer residence in Arizona were for money orders purchased in Arizona and sent to John Harris in Ohio. Delores Fisi testified that she and her husband were in Phoenix with Dean Milo at the same time Ridle had said that defendant had alerted him that Dean would be in Phoenix, and during the time Ridle said an abortive attempt had been made by Knott and a hit man to kill Dean. The evidence of telephone calls having been made between defendant's telephone number and Sessic's, and between Sessic's and Tempe, Arizona, tended to corroborate Ridle's testimony concerning telephone calls made between Sessic and defendant, and Sessic and Arizona.

Accordingly, the fifth assignment of error is overruled.

The assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

REILLY and MOYER, *JJ.*, concur.

JOURNAL ENTRY OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

(Filed September 30, 1982)

No. 81AP-746

IN THE COURT OF APPEALS
FOR FRANKLIN COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

FREDERICK P. MILO,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on September 30, 1982, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

REILLY, MOYER & NORRIS, *JJ.*
By /s/ ALAN E. NORRIS
Judge

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated January 26, 1983)

No. 82-1682

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,

Appellee,

vs.

FREDERICK P. MILO,

Appellant.

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL

(Dated January 26, 1983)

No. 82-1682

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,

Appellee,

vs.

FREDERICK P. MILO,

Appellant.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

It is ordered by the Court that this motion is overruled.

OHIO STATUTES INVOLVED

Former Ohio Revised Code: §2903.01 (in effect at petitioner's trial):

2903.01 *Aggravated Murder.*

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

* * * * *

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

* * * * *

2945.39 Plea of not guilty by reason of insanity; procedures; admissions not available in criminal case

(A) If a defendant enters a plea of not guilty by reason of insanity, the court may order one or more, but not more than three, evaluations of the defendant's mental condition at the time of the commission of the offense. The court shall order that each evaluation be conducted through examination of the defendant by any of the following:

(1) A forensic center designated by the department of mental health to conduct such examination and make such evaluations in the area in which the court is located;

(2) Any other program or facility that is designated by the department of mental health or the department of mental retardation and developmental disabilities to conduct such examinations and make such evaluations, provided the center, program or facility is operated by the appropriate department or is certified by such department as being in compliance with the standards established under division (J) of section 5119.01 or division (C) of section 5123.04 of the Revised Code;

(3) A center, program, or facility designated by the court other than one designated by the appropriate department.

In any case, the court may designate examiners other than the personnel of the center, program, facility, or department to make the examination. If more than one examination is ordered, the prosecutor and the defendant may recommend to the court an examiner whom each prefers to have perform one of the examinations.

* * * * *

(C) . . .

The court shall inform any examiner it appoints of the offense of which the defendant is charged. The court shall notify the prosecutor and defense counsel immediately upon the appointment of an examiner under this section, and specify the name and address of the examiner. An examiner appointed under this section may be called as a witness by the court or any party and shall be subject to direct and cross-examination by the prosecutor and defense counsel. Neither the appointment nor the testimony of an examiner appointed under this section precludes the prosecutor or defense counsel from calling other witnesses to testify on the insanity issue.

The examiner shall complete the examination within thirty days after the court's order for the evaluation and shall prepare and provide to the court, prosecutor, and defense counsel a written report concerning the mental condition of the defendant.

* * * * *

(D) No statement made by a defendant in an examination or hearing relating to his mental condition at the time of the commission of an offense shall be used in evidence against him on the issue of guilt in any criminal action.

EXCERPTS FROM STATE'S CLOSING ARGUMENT AND REBUTTAL

"One very important part of this trial . . . is when the witnesses come in before you, and they take an oath, and they subject themselves to cross-examination.

(R. IV p. 4)

. . . the defendant himself in the last position he took in this case acknowledged some type of payment of money.

(R. IV p. 9)

I have listed positions or scripts or whatever we will call them here of the defendant. Keep in mind the defendant is the one that is on trial . . . analyze the positions of the defense—the defendant.

(R. IV p. 16)

but for his arrest and but for the police being fairly tenacious with this case, [Defendant would have continued to say he knew nothing about the case rather than raise insanity].

(R. IV p. 31)

That is saved for us. Position No. 4 [insanity defense theory] is saved for his Court presentation and started on January 28th, 1981.

* * * * *

Keep in mind that that position comes from a source that is a little bit different than the other witnesses who testified in Court that walked in and took an oath and walked in and subjected themselves to cross-examination.

When you hear the term, cross-examination, thrown around, you may say well, what do I really mean by that? We mean when you heard the State's witnesses come in, they walked in took an oath. Then they got done with the presentation or the prosecutor's questioning and then they subjected themselves to questioning by the opposing side. That is very important, regardless of what Dr. Tanay says, that in our system of justice, the only way—you know, it is very difficult to resolve disputes; but the foundation of

resolving those disputes that—if they can't be settled prior to Court—we have people come in, take an oath, and they swear to tell the truth. . . Then they subject themselves to questioning by the other side. You can see things change.

• • • • •

Mr. Pappas [defense counsel] thinks it is very important because [sic] aggressively cross-examined just about all the State's witnesses, anybody that really had anything to say that really damaged his client. Those two things are very important. If you forget a lot of legal talk and everything else, keep that in mind that this is the foundation of our system.

Well, Position No. 4 [insanity defense] didn't come to us the way that the testimony came through the other witnesses. It came through a T.V. screen. On the T.V. screen, you heard Judge Bayer say that, you know, this fellow is not sworn and also was not subjected to cross-examination of the opposing party. In that case it would be the State of Ohio. That is very, very important.

You know, not too many things upset me during a prosecution because I guess everything has happened to me in the past. But that does because the two basic rights of the system are being denied one party that being the State of Ohio.

There was no oath. There was no cross-examination . . . We are trying to arrive at the truth.

The source of Position No. 4, comes from an area that did not have the basic protections that we use when we try to arrive at the truth. . . Keep in mind it

is the defendant telling him this which is obviously a very interested party.

(R. IV pp. 34-37)

* * * * *

Now Position No. 4. When you analyze that that is the position, the official position that is being offered to us now. I would like you to consider the fact that the foundation for that position came from a source where there was no cross-examination. There was no oath. Then, therefore, we hear secondhand from the people that interviewed him as to what their position was.

(R. IV pp. 39-40)

There are two things you learned from this trial. This is about the oath and cross-examination.

* * * * *

The law is not manipulated that easily.

(R. IV p. 41)

REBUTTAL

". . . The source of the animosity and humiliation is from the defendant himself. You never heard testimony of humiliation. You never heard testimony that he was told not to talk to people and not to do this and that. You never heard stories about the carnation business. . .

(R. IV p. 46)

The source of the defense of insanity is Position No. 4. That is based on a source that was not—based on a television videotape. . . [Dr. Tanay] didn't think the oath was necessary.

Well, I want you to keep that in mind. I did stress that before.

(R. IV pp. 50-51)

There is evidence . . . from the tainted source of Fred [the defendant] himself.

* * * * *

[Dr. Tanay believes] he can handle cross-examination and he can handle oaths. . .

(R. IV p. 52)

Consider the source of the defense. We know that [the defendant] deceived his father. We know very importantly that he deceived his attorney.

(R.VOL. IV p. 55)

The last form of deception that we have of course, Position No. 4. That is what we are going to have to rely on. You will have to go in there and say did the defendant meet his burden based on Position No. 4, that came from the person that is on trial? There is no question that insanity defenses aren't popular because you really can't say what is in somebody's mind. . . You can say this is what was in my mind.

(R. IV p. 58)

Defendant has come up with an insanity defense after his arrest to help extricate himself from this.

* * * * *

This defendant is attempting to weasel his way out of his responsibility based on this insanity defense that he created 40 days after his arrest.

(R. IV p. 59).

EXCERPT OF SENTENCING

Case No. 80-10-1392F

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO,
Plaintiff,

v.

RAYMOND SESIC,
Defendant.

APPEARANCES:

FREDERIC L. ZUCH, Assistant County Prosecutor,
On behalf of the State of Ohio.

DENNIS BARTEK, Attorney at Law,
On behalf of the Defendant.

BE IT REMEMBERED that upon the hearing of the above-entitled matter in the Court of Common Pleas of Summit County, Ohio, before the Honorable Frank J. Bayer, Judge Presiding, and commencing on August 7, 1981, the following proceedings were had, being an Excerpt of Sentencing:
(Beginning of Excerpt.)

[2] Mr. Bartek: The only reason I'm offering this argument is to show that his degree of moral turpitude is different that [sic] the degree of moral turpitude for others involved, including Fred Milo.

The Court: I don't know. There's some question in my mind, probably always will be, whether or not

Fred Milo was insane. I don't think you can say your client was insane.

Mr. Bartek: I'm not suggesting that my client's insane. I have no idea whether Fred Milo was or not. If he was insane I don't think he should have been convicted.

The Court: It was a close point. It was a close point.

Mr. Bartek: I don't know the answer to that.

(End of Excerpt.)